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No. 02-1402

Supreme Court, U.S.
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In the

Supreme Court of the United States

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION: JOHN M. QUAIN, CHAIRMAN; ROBERT K. BLOOM, VICE CHAIRMAN; NORA MEAD BROWNELL, COMMISSIONER; AARON WILSON, JR., COMMISSIONER; TERRENCE J. FITZPATRICK, COMMISSIONER,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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PETITIONER'S REPLY MEMORANDUM

There is no precedent for applying the equitable doctrine of collateral estoppel to preclude the Eleventh Amendment defense of sovereign immunity where the denial of immunity occurred in a prior unrelated case based on the "burden of proof" test. Amtrak and the Third Circuit have cited none, because none exits. Precedent of this Court does exist, ruling that preclusion principles do not apply to a prior denial of immunity where, as in this case, judgment was rendered in favor of the party claiming the immunity[1]. *Mathias v. Worldcom Technologies*, Inc., 535 U.S. 682 (2002). Yet, contrary to *Mathias*, the Third Circuit rules that preclusion principles do apply to a prior denial of immunity where judgment was rendered in favor of the party raising the immunity[2].

Amtrak's Brief in Opposition in No. 02-1402, fails to even address the application of the rule in *Mathias* to the present case. Rather, Amtrak's arguments rest entirely upon cases such as *Montana v. United States*, 440 U.S. 147(1979), in which preclusion principles are found to be applicable based upon the government's voluntary participation in the prior litigation. (Brief in Opp., at 11) Thus, Amtrak's opposition is deficient in failing to overcome both: 1) the application of *Mathias;* and, 2) the material distinction between the present

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[1] In the prior litigation, Amtrak brought suit and the PA PUC raised the defense of sovereign immunity to defeat Amtrak's claim. The federal district court denied immunity, but, none the less, dismissed Amtrak's suit. (Pet. App. at 68a)

[2] The Third Circuit affirmed the district court's application of collateral estippel to bar the Eleventh Amendment defense of sovereign immunity based upon loss of that immunity in prior unrelated litigation for failure to carry burden of proof for entitlement to immunity. (Pet. App. at 18a)

case and those applying preclusion principles where loss of immunity turned on the government's voluntary participation in prior litigation.

Amtrak fails to overcome direct conflict between the Third Circuit's Order and this Court's jurisdictional ruling in *Mathias v. Worldcom Technologies, Inc.*

Amtrak purports to refute the PA PUC's position that the Third Circuit's holding is in direct conflict with precedent of this Court which sets the boundaries of the federal court's jurisdiction in the present case. Yet, Amtrak's opposition, however stated, serves to further illuminate for this Court the sum of the jurisdictional and constitutional principles which continue to elude Amtrak and the Third Circuit.

Amtrak's fundamental misapprehension of this case, shared by the Third Circuit, is illustrated by Amtrak's failure to recognize that the Third Circuit's Order is in direct conflict with this Court's unanimous jurisdictional holding in *Mathias v. Worldcom Technologies*, Inc. Amtrak deems *Mathias* worthy of only a foot note to dismiss. (Brief in Opp., p. 12, fn. 7)

In *Mathias*, this Court unanimously ordered dismissal, as improvidently granted, of an appeal by a state utility commission from the denial of the affirmative defense of sovereign immunity. After full briefing and oral argument, the reasons for dismissal were unanimously stated in this Court's order:

> [I]t is now clear that petitioners were the prevailing party below, and seek review of uncongenial findings not essential to the

> judgment and not binding upon them in future litigation. As a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous. *See, New York Telephone Company v. Maltbie*, 291 U.S. 645 (1934) (per curium)

Mathias v. Worldcom Technologies, Inc., 535 U.S. at 684.

Clearly, the jurisdictional ruling in *Mathias* treated the issues of "no right to appeal from a favorable ruling" and "preclusion of adverse determinations contained in a favorable ruling" as hand-in-hand from a jurisdictional standpoint. Thus, in *Mathias*, this Court's unanimous and unequivocal ruling is that:

> The denial of a state utility commission's immunity which occurred in a prior case resulting in judgment in favor of the commission ***is not*** *binding in future litigation.*

Contrary to *Mathias*, in the present case the Third Circuit's ruling is that:

> The denial of a state utility commission's immunity which occurred in a prior case resulting in judgment in favor of the commission ***is*** *binding in future litigation*

In the face of the direct conflict between *Mathias* and the Third Circuit's order, Amtrak notes of *Mathias*:

> That decision did nothing more than dismiss a writ of certiorari as improvidently granted and contains no analysis of the preclusion issue. In any event such a dismissal says nothing about the merits of the case. *Highs Tool Co. v. Trans World Airlines*, 409 U.S. 363, 366 n. 1(1973). Thus, contrary to PUC's assertion, there is no conflict between *Mathias* and the Third Circuit's decision in this case.
>
> (Brief in Opp., p. 12, fn. 7)

Amtrak's dismissive response to the unanimous pronouncement of this Court in *Mathias* is nothing short of astounding[3]. Amtrak's response and the Third Circuit's holding reflect their utter failure to grasp the fundamental constitutional principles which underpin

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[3] Amtrak's assertion that *Mathias* "did not discuss the preclusion issue" is indicative of Amtrak's the lack of awareness of *Mathias*' bearing on the present matter. Amtrak is simply incorrect. In *Mathias* this Court expressly stated that an appeal of the denial of immunity in a case in which the commission prevails is an appeal from a ruling which is "not binding in future litigation". *Mathias* at 684.

Amtrak and the Third Circuit are profoundly confused if it escapes their comprehension that "preclusion" is the synonymous with "binding in future litigation". To say a ruling is "not binding in future litigation" is another way of saying "will not be afforded preclusive effect."

This Court is of the unequivocal opinion that the denial of a state commission's defense of sovereign immunity in a case in which the commission prevails will **not** be afforded preclusive effect in subsequent cases. Yet, the Third Circuit has rendered a decision which does precisely that.

the holding in *Mathias*, regarding jurisdiction of the federal courts to hear appeals from and apply preclusion principles to adverse findings rendered against a party which prevails at judgment, the very principles which control the outcome of the present case [4].

Where this Court states specific reasons for the denial of Certiorari, in certain cases, the denial of Certiorari is a pronouncement of the Court's view on an important jurisdictional issue. *See, Parker v. Ellis*, 362 U.S. 574, 576 (1960) wherein Court observed that "[i]t is precisely because a denial of a petition for certiorari without more has no significance as a ruling that an explicit statement of the reasons for the denial means what it says."

It is without doubt that this Court's Order of dismissal in *Mathias* was a pronouncement of the Court's jurisdictional basis for dismissal. *Mathias* at 684. *See, Verizon Maryland, Inc., v. Public Service Commission of Maryland, and ,United States v. Public Service of Commission Maryland* , 534 U.S. 1072 (2002) (noting that Court may be unable to reach merits of the questions presented in *Mathias*), and, *Verizon Maryland, Inc., v. Public Service Commission of Maryland, and, United States v. Public Service of Commission Maryland, 535 U.S. 635, 642(2002)(*granting certiorari of issues " for reasons explained in our decision in *Mathias").* The Third Circuit and Amtrak fail to grasp the meaning of the

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[4] As noted in the Petition for Certiorari, the PA PUC notified the Third Circuit of the issuance of controlling authority by this Court, on the same day that *Mathias* was decided. Despite notice of *Mathias*, the Third Circuit declined, without giving its reason, to grant reargument to consider *Mathias*. Thus, we are required to guess the Third Circuit's basis for declining to apply *Mathias*.

reasons given in *Mathias*, as well as the relevance of that order to the present case.

The order in *Mathias* instructs as it applies the long standing rule of this Court that if the Article III jurisdictional powers of the federal court do not extend to the state commission's appeal from denial of immunity where judgment had been rendered in favor of the commission, on the basis that the immunity issue is "unnecessary to the judgment, " it follows, therefore, that the federal courts also lack authority to afford preclusive effect to the prior denial of immunity in subsequent cases since the required element for applying preclusion principles, that the ruling was "necessary to the judgment[5]" is not satisfied. *See*, *Cardinal Chemical Company* 508 U.S. 83 (1993) (discussing, within context of patent litigation, issues of mootness as precluding Article III power of the Court).

In *Mathias*, this Court found it could not reach the merits of any of the questions presented in the commission's appeal because the state commission did not have standing to seek the Court's review. Since the

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[5] The Third Circuit's basis for finding the denial of immunity "necessary to the judgment" was that denial of immunity was a threshold question to denial of the PA PUC's claim for relief pursuant to *Seminole Tribe v. Florida*, 517 U.S. 44(1996). (Pet. App. at 10a) The Third Circuit failed to perceive that *Seminole Tribe* is itself, relief associated with the claim of immunity – they are one in the same. The PA PUC's claim of the defense of sovereign immunity along with all its associated relief, does not transform the denial of immunity into a ruling "necessary to the judgment" rendered in favor of the PA PUC, dismissing Amtrak's suit. Further, it is absurd to suggest that the PA PUC's act of requesting the relief associated to its claim of sovereign immunity now serves to expose its claim of sovereign immunity to preclusion. If this were so, the PA PUC would occupy a better position, had it raised the defense but not requested the relief associated with it.

Court could not reach the merits of the appeal, certiorari was dismissed as improvidently granted. In the context of the dismissal for lack of jurisdiction, this Court unanimously stated that the subject of the questions presented by the commission, which included the denial of immunity, constituted appeal from findings "not necessary to the proceeding and not binding in future litigation." *Mathias* at 684.

Contrary to Amtrak's assertion that *Mathias* "contains no analysis of the preclusion issue" (Brief in Opp., at p. 12, fn. 7), it is evident this Court is of the opinion that preclusion principles does not apply to adverse determinations rendered in the context of a judgment in favor of that party.

Amtrak's offhanded rejection of genuine conflict between the Third Circuit's Order and *Mathias*, like the Third Circuit's refusal to reconsider its holding on the basis of *Mathias*, affirmatively demonstrates a profound misapprehension of the jurisdictional issue upon which this Court unanimously based *Mathias*.

Mathias directly controls the result in this present case, since it requires the holding that denial of the PA PUC's claim of sovereign immunity in the prior case in which judgment was rendered in favor of the PA PUC is not binding in the present and future cases brought by Amtrak. If *Mathias* "means what it says," the Order of the Third Circuit must be reversed[6].

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[6]The application of *Mathias* entirely refutes the remaining basis for opposition to the petition stated by Amtrak. Since *Mathias* controls the issue whether the denial of sovereign immunity was "necessary to judgment" the Third Circuit's basis for application of collateral estoppel and denial of the defense is jurisdictionally flawed. The application of *Stauffer* is unconstitutional and not a mere "misapplication of correctly stated legal principle" (Brief in Opp., at

Amtrak fails to reconcile the material distinction between the present case and those applying preclusion principles based upon government's voluntary participation in prior litigation

Amtrak's other points raised in opposition to the petition simply fail to accept that a material distinction exists between the present case and those cases applying preclusion principles, where denial of immunity was due to the government's voluntary participation in the prior litigation. (Brief in Opp., p. 11) *See e.g., Montana v. United States*, 440 U.S. 147(1979)(preclusion of constitutional claim that state taxing statute violated Supremacy Clause, based on fact that government had initiated and lost legal issue before state court, then sought to relitigate the issue before the federal court). Amtrak simply fails to perceive the relevance of this distinction.

Amtrak cites *Montana as* "flatly contradicting" the PA PUC's position. (Brief in Opp., at p. 11). To the contrary, the facts in *Montana* are so different from the facts presented in the present case; *Montana* illustrates the correctness of the PA PUC's position. First and foremost, *Montana* was a case in which the federal government was a claimant who had initiated suit. The government was found to have initiated litigation both in the state court and the federal court, which were an identical cause of action. The case was not a case of an "affirmative defense" with a burden of proof test associated with its entitlement. The constitutional claim was initiated by the government to overturn a state tax statute to avoid the costs associated with the tax.

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p. 13), because, as applied to the affirmative defense of sovereign immunity in this case, it exceeds the scope of the federal court's Article III power.

Montana was not a case where the government was claiming its immunity from suit in federal court. The constitutional claim in that case *was* necessary to the case because *it was in fact the merits of the case*[7].

In the present case it can not seriously be maintained that the defense of sovereign immunity is related in any way to the underlying suits repeatedly brought by Amtrak in federal court. It is because the defense of sovereign immunity is uniquely *un*related to judgment on the merits of *any* case that application of preclusion principles to bar the defense, under the facts presented in this case, is not authorized. *See, Mathias at 684.*

The Third Circuit's application of preclusion principles to the Eleventh Amendment defense of sovereign immunity based upon a prior denial for failure to carry the burden of proof, reduces the analysis of a constitutional right to "one strike you're out." The injustice of denial of the affirmative defense of Eleventh Amendment sovereign immunity without review is self evident.

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[7] Further, *Montana* serves to support the PA PUC's position that there must be a finding of waiver or voluntary consent to suit in the prior case, in order to appropriately apply the doctrine of collateral estoppel to the defense of sovereign immunity in a subsequent case. Amtrak argues that the PA PUC's position that such a finding is required, "seeks review of questions not presented". (Brief in Opp., at p. 8). Such a finding was never "at issue" in this case because the district and circuit courts failed to require it. The *Montana Court* viewed the government's voluntary participation as key to application of preclusion; the Third Circuit apparently does not. In *Montana* the view that the government had manned the "laboring oar" was pivotal to the application of preclusion principles. Thus, *Montana* is entirely consistent with the PA PUC's position.

In view of the Third Circuit's profound misapprehension of the jurisdictional principles which control the outcome of the present case, the Order of the Third Circuit which results in an unconstitutional deprivation of a state agency's right to raise the defense of sovereign immunity, and, the Third Circuit's Order in direct conflict with the controlling precedent of this Court in *Mathias*, the need for grant of review in this case is indisputable.

Respectfully submitted,

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